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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 89

THE UNITED STATES OF AMERICA,
Appellant,

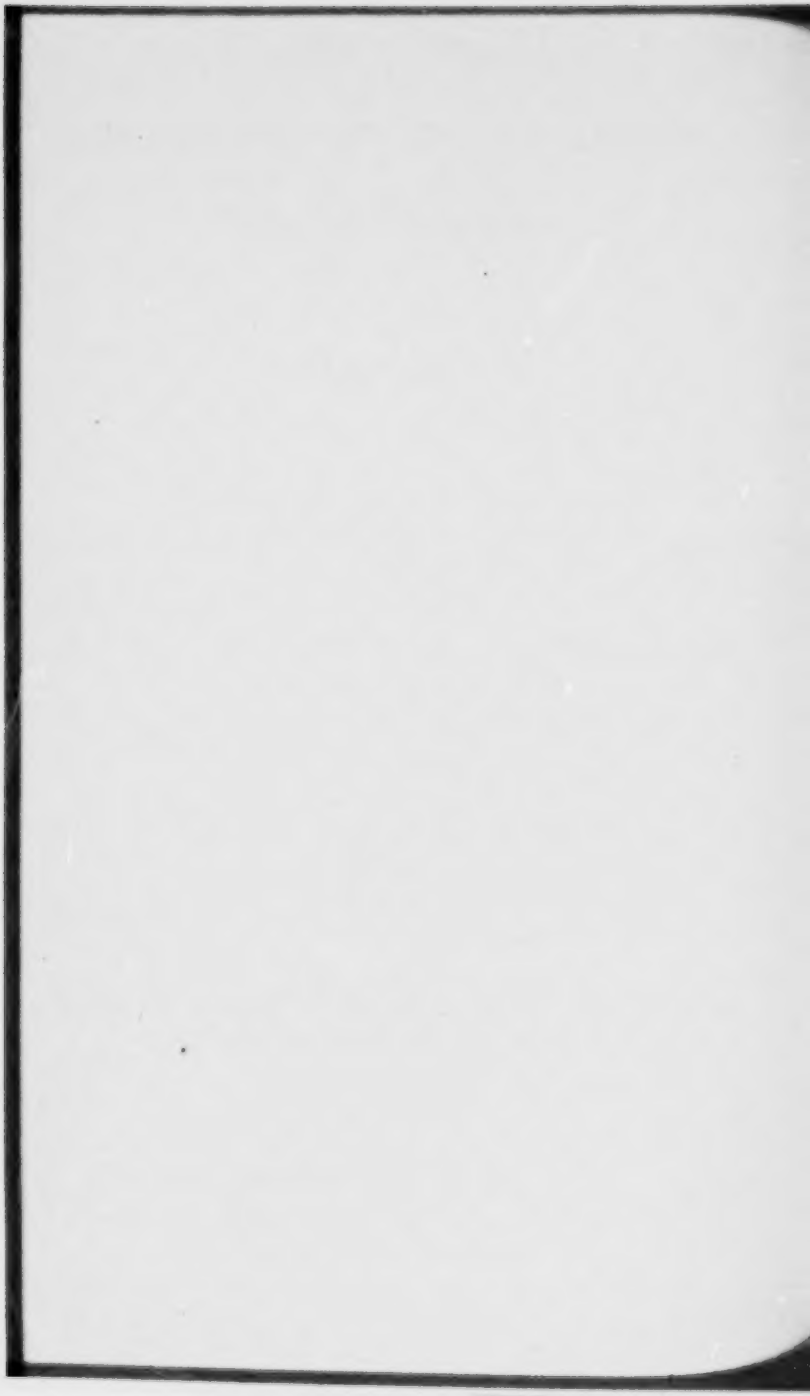
vs.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

STATEMENT OF ALEXANDRIA DAIRY PRODUCTS CO., INC., OPPOSING JURISDICTION

WILLIAM BLUM, JR.,
Counsel for Appellee.



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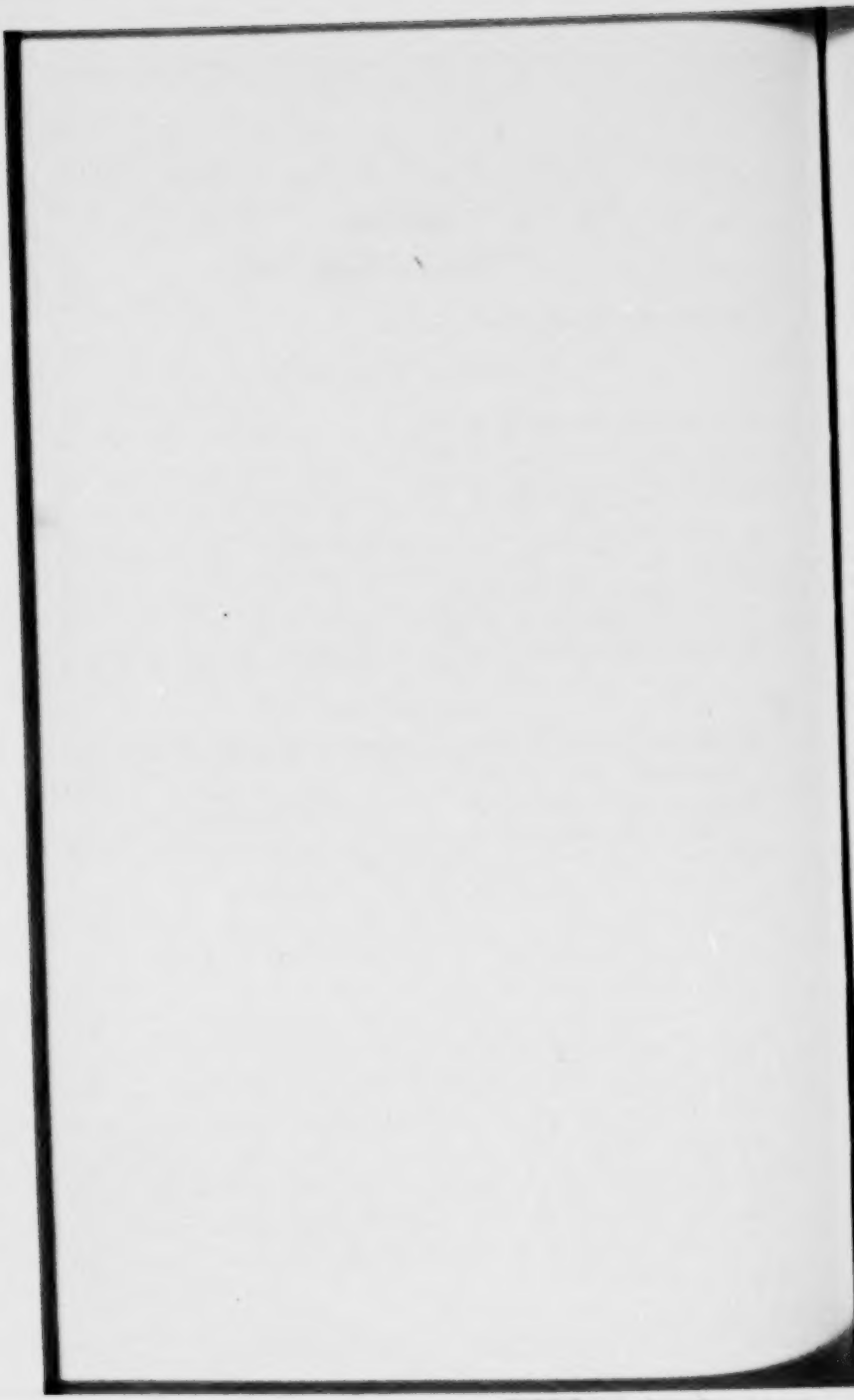

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1948

CRIMINAL ACTION

No. 294-48

UNITED STATES OF AMERICA

vs.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., ET AL.

STATEMENT IN OPPOSITION TO JURISDICTION ON BEHALF OF DEFENDANT, ALEXANDRIA DAIRY PRODUCTS CO., INC.

Alexandria Dairy Products Co., Inc., by its attorney, pursuant to Paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States, submits the following statement in opposition to the jurisdiction of the Supreme Court in the instant case.

The United States attempts to appeal, under the Criminal Appeals Act, as amended by the Act of May 9, 1942, 56 Stat. 271, Chap, 295, 18 U. S. C. A. Sec. 682, Pocket Part, from an order of the District Court of the United States for the District of Columbia dismissing an indictment allegedly based on Section 3 of the Sherman Anti-Trust Act.

Motions to dismiss the indictment were granted by the court below with an oral opinion as follows:

"Opinion of the District Court

The Court: The motion to dismiss is in two parts; one, that it is duplicitous, and the other that the indictment is bad in substance.

The Court holds that the indictment is not duplicitous.

As to the second ground, namely, that this indictment does not charge a crime, the Court grants the motion to dismiss, believing that there has been a failure to set forth sufficient facts.

In doing this, I am not holding that the Sherman Act would not under any circumstances be applicable to a case involving a cooperative. I recognize and subscribe—as I must—to the determination in the *Borden* case, which holds that cooperatives are not exempt from the Sherman Act. I merely hold that the indictment in this case does not set forth sufficient facts to constitute a conspiracy in violation of Sec. 3 of the Sherman Act, in the view that I take of that Act and other Acts referred to in argument and judicial precedents presented.

Mr. Winn: Exception. That there are not adequate facts pleaded to make an offense.

Mr. Seal: That goes to all the defendants?

The Court: Yes, sir." (R. 333-334)

The oral opinion shows that the court below did not predicate its dismissal of the indictment in this case solely on the construction of a statute, and hence the Supreme Court has no jurisdiction over the instant appeal.

The Criminal Appeals statute limits the instances in which the Supreme Court has jurisdiction on a direct appeal from an order dismissing an indictment to decisions predicated *solely* on the construction of a statute. *U. S.* v. *Borden,* 308 U. S. 188, 193. If the decision is, even "in part

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at least," based "on the inadequacy of the allegations of the indictment" to charge an offense, the ruling is predicated on a "matter of pleading" and the "correctness • • • (of the ruling) cannot under the statute be reviewed • • • on direct appeal from the district court." *U. S.* v. *Swift*, 318 U. S. 442, 444.

The only basis given by the court below for its dismissal of the indictment was contained in its oral opinion, in which it appears that the court placed its dismissal of the indictment on the ground, twice stated, that the indictment failed to set forth sufficient facts. Counsel for the United States, in stating his exceptions, construed the ruling to be "that there are not adequate facts pleaded to make an offense."

Therefore, it seems plain that the ruling of the District Court that "the indictment in this case does not set forth sufficient facts to constitute a conspiracy" is, within the doctrine of the *Swift* case, *supra*, a ruling based "in part at least" on the inadequacy of the indictment as a pleading. From this it follows, we think, that the Supreme Court does not have jurisdiction over the instant appeal.

The decision below, at best, must be held ambiguous, and under these circumstances no appeal lies to this Court. The Supreme Court in *U. S.* v. *Wayne Pump Co.*, 317 U. S. 200-204, dismissed the appeal, stating, "The language of the opinion makes it apparent to us that the District Court's conclusion was at least in part bottomed upon the indefiniteness, uncertainty and lack of specificity of the indictments." In *U. S.* v. *Carter*, 231 U. S. 492, again the Supreme Court refused to attempt to solve the problem as to the ground on which the court ruled by an examination of the entire record. It held that the Criminal Appeals Act precluded review *in the absence of a clear showing that the statute applied.* In *U. S.* v. *Moist*, 231 U. S. 701, this Court like-

wise refused to pass on an appeal where it did not appear on what ground the court acted.

As stated in *Robertson & Kirkham's Jurisdiction of the Supreme Court,* Section 169: "Where the grounds of the District Court's decision are ambiguous, doubt will be resolved *against* applied jurisdiction." Also suggested in that section is the following proposal which would resolve what the Court intended:

> "In order to guard against difficulties of this character, it has become established practice to procure the District Judge to *execute a certificate declaring that his judgment was put entirely upon the construction or the invalidity of the statute* upon which the indictment was founded and to include such certificate in the transcript of record on appeal." Italics supplied by counsel.)
>
> Citing: *U. S.* v. *Chavez,* 290 U. S. 357-59;
> *U. S.* v. *Flores,* 289 U. S. 137-145;
> *U. S.* v. *Hastings,* 296 U. S. 190-191;
> *U. S.* v. *Halsey Stewart Co.,* 296 U. S. 451.

The reporter's transcript of the arguments supporting the motions to dismiss in this case were not received by this defendant until June 2, 1948, and on receipt was found to be full of errors, garbles, and incomplete statements. Before this transcript is accepted as the record in the case, the defendant would like an opportunity to eliminate or clear up some of the less intelligible spots.*

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* The transcript starts off on page 2 with Alexandria Dairy's attorney named as William J. Blum instead of William Blum, Jr. In addition to generally confusing both the Court's questions to him and his answers thereto, appearing on pages 66, 67 and 68, the name "Alexandria" was substituted by the stenographer for the words "Chevy-Chase Chestnut Farms" in the critical statement of Government counsel on page 94, line 3.

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Conclusion

Because it is contended that the judgment below was at least in part based upon the invalidity of the indictment as a pleading, the present appeal should be remanded in accordance with the provisions of the Act of May 9, 1942, 18 U. S. C. A. 682 (Pocket Part) to the Circuit Court of Appeals for the District of Columbia. Or if the government insists that the judgment below was based solely upon a construction of a Federal statute, it should pursue the obvious course of obtaining a certificate to that effect from the trial judge, in accordance with approved practice. Neither this Court nor counsel should be burdened with the difficulty and uncertainty of a procedural question, jurisdictional in character, which can so easily be eliminated from the case.

Respectfully submitted,

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